MALAYAN BANKING BERHAD v. GAN KONG YAM

[O.C.J. (Raja Azlan Shah J.) October 7, 1971]

[Kuala Lumpur — Civil Suit No. 99 of 1969]

Practice and Procedure — Pleadings — Application to strike out paragraphs of defence — Application made after close of pleadings — Out of time — Whether rendered null and void — Discretion of court — R.S.C. 1957, O. 19 rr. 6 & 27, O. 25 r. 4, & O. 27 r. 13.

The plaintiff claimed the sum of $6,131.62 which was owed by the defendant on a current account at the plaintiff's branch in Mentakab. The defendant in his defence denied owing such sum and alleged that the account had been manipulated by the plaintiff's branch manager in Mentakab. Pleadings in this case had been filed and the plaintiff filed its reply on August 17, 1969. On September 18, 1969 plaintiff filed its notice of trial. On December 2, 1969 the plaintiff obtained an order for the defendant to file particulars of the statement of defence. The defendant filed the particulars on February 2, 1970. Subsequently the plaintiff not being satisfied with the particular applied to the court for an order to strike out certain paragraphs of the statement of defence as disclosing no reasonable defence or as being frivolous or vexatious or tending to delay the fair trial of the action.

Defence counsel raised a preliminary objection to the application of March 16, 1970, contending that it was out of time because the plaintiff, having filed its reply on August 17, 1969 R.S.C. Order 27 rule 14 rendered the plaintiff's application nugatory. It was emphasized that on September 18, 1969, the plaintiff filed its notice of entry of trial and on that same day notice of trial was issued, and only after nearly six months later did the plaintiff file this particular application.

Held: (1) although the application was made more than seven days after the close of pleadings, on the facts in this case and in particular the fact that the application was made after the filing of particulars by the defendant, it was made reasonably promptly, since in any event the case had not yet been set down for trial;

(2) in this case the defendant had failed to give particulars of his defence and as the defendant had not been able to raise any sustainable argument against the plaintiff's application, the application was allowed.

Cases referred to:-

(1) *Cross* v. *Earl Howe* 62 L.J. Ch. 342.

(2) *Republic of Peru* v. *Peruvian Guano Co.* 36 Ch. D. 496.

(3) *Attorney-General of the Duchy of Lancaster* v. *London and North Western Rly. Co.* [1892] 3 Ch. 77.

(4) *Newport (Monmouth) Slipway Dry Dock & Engineering Co. Ltd.* v. *Payulier* (1886) 34 Ch. D. 88.

(5) *Wallingford* v. *Mutual Society* (1880) 5 App. Cas. 697.

CIVIL SUIT.

Tan Jake Lian for the plaintiff.

Phillip Nainan for the defendant.

Cur. Adv. Vult.

Raja Azlan Shah J.: This is an application by the plaintiff by way of a summons-in-chambers for an order that certain paragraphs of the statement of defence be struck out as disclosing no reasonable defence or as being frivolous or vexatious or tending to delay the fair trial of this action and costs.

The case was argued in open court. Counsel for the defence raised a preliminary objection to this application. In a nutshell it was the contention of the defence that this application dated the 16th of March, 1970 was out of time because the plaintiff, having filed its reply on the 17th of August, 1969, Order 27 rule 13 of the Rules of the Supreme Court, 1957 provides for the close of pleadings seven days after the delivery of a reply, therefore rendering the plaintiff's application nugatory. Counsel for the defence further buttressed his objection by stating that on the 18th of September, 1969 plaintiff filed its notice of entry of trial and on the same day notice of trial was issued and only after nearly six months later did the plaintiff file this particular application.

The preliminary objection is not without merit. Order 71 rule 1(10) provides that pleadings "include any petition or summons". Then again, in *Cross* v. *Earl Howe*(1) it was held that an application to strike out a defence or any part thereof should always be made promptly and as a rule, this should be before the close of pleadings. It follows therefore that undue delay in presenting an application to strike out under either Order 19 rule 27 or Order 25 rule 4 may be refused by the court in exercise of its discretion.

Nonetheless each application and for that matter every objection has to be judged on its own merit and circumstances. In this case, the plaintiff did file its reply on the 17th of August, 1969 and did also have the notice of trial issued on the 18th of September, 1969. However on the 2nd of December, 1969 the plaintiff filed a summons-in-chambers asking for an order that the defendant serve on the plaintiff particulars of the statement of defence. To this application there was no record of the defendant objecting that it was out of time. In fact the defendant in compliance with the order of the learned senior assistant registrar pursuant to the summons-in-chambers dated the 2nd of December, 1969 did file his particulars on the 2nd of February, 1970. Evidently counsel for the plaintiff felt that the particulars were insufficient so he then filed a summons-in-chambers on the 16th of March, 1970 asking that the court strike out such parts of the defence as enumerated in the said summons-in-chambers. To this application, counsel for the defendant has raised his objection.

As has been stated earlier, this objection is not without merit. However, after considering the events that have led to this application, in particular, the fact that this application was made after the filing of particulars by the defendant on the 2nd of February, 1970, it is felt that the application was made reasonably promptly since in any event, this case was not yet set down for trial. Further the application was only made after the defendant was given every opportunity to particularise his defence which he seems not to have done. The objection is accordingly disallowed.

Coming now to the essence of the application, it is the assertion of counsel for the plaintiff that paragraphs 4, 5, 6, 7, 9 and 11 of the statement of defence disclose no reasonable cause of defence or are frivolous or vexatious or tend to delay the fair trial of this action. It can safely be presumed that the plaintiff came to this conclusion after the defendant filed his

particulars, which particulars the plaintiff thinks do not add more to or clarify the statement of defence.

No precise legal definition can be found as yet, as to the meaning of "no reasonable defence" or "frivolous or vexatious" or "tending to delay the fair trial of the action", but as can be observed a pleading will not be struck out under this rule "unless it is not only demurrable but something worse than demurrable", that is, such that no legitimate amendment can save it from being demurrable: *per* Chitty J., in *Republic of Peru* v. *Peruvian Guano Co.*[2]

Then again, frivolous or vexatious actions mean cases which are obviously frivolous or vexatious or obviously unsustainable: see *Attorney General of the Duchy of Lancaster* v. *London and North Western Railway Co.*[3]

When a pleading is defective only in not containing particulars to which the other side is entitled, application should be made for a further and better statement of the nature of the claim or defence and not for an order to strike out under this rule. In this case, the plaintiff has asked for further particulars and these have been supplied but not to the satisfaction of the plaintiff in that they seemingly do not contain the particulars the plaintiff needs. So the plaintiff has applied for an order to strike out and rightly so, after having exhausted the other requirements of procedure.

Order 25 rule 4 provides that:

"The court of a judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly as may be just."

Order 19 rule 6(1) provides that:

"In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleadings";

and there is a proviso thereto which is not relevant here.

This last mentioned rule of pleading has been expounded time and time again in numerous cases Thus in *Newport (Monmouth) Slipway Dry Dock & Engineering Co. Ltd.* v. *Payulier*[4] it was said that a party alleging that entries in his opponents' books are false must give particulars stating which entries are objected to and the nature of the objection to each of them.

In *Wallingford* v. *Mutual Society*,[5] the Lord Chancellor, Lord Selborne, said:

"With regard to fraud if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated are insufficient even to amount to an averment of fraud of which any court ought to take notice."

In the same case, Lord Blackburn had this to say:

"So again, if you swear that there was fraud that will not do. It is difficult to define it, but you must give such an extent of definite facts pointing to the fraud as to satisfy the judge that those are facts which make it reasonable that you should be allowed to raise that defence."

The plaintiff's claim, short and simple, is for a sum of $6,131.62 which the defendant is owing on a current account with the plaintiff's bank in Mentakab. In his defence, the defendant denies owing such sum or any sum but states that a current account was opened by him at the instance, advice and or inducement of one Teh Hong Chiang, manager of the plaintiff's bank in Mentakab. The defendant further alleges that the said Teh Hong Chiang has been manipulating the defendant's current account. Another allegation is that the defendant had from time to time signed blank cheques and gave them to the said Teh Hong Chiang, again at the instance, advice and or inducement of the said Teh Hong Chiang. Further allegations of a similar nature were made by the defendant in his defence at paragraph 7, 9 and 11.

The particulars filed by the defendant on the 2nd of February, 1970 are in effect a reiteration of the allegations contained in the statement of defence. Nowhere has the defendant given definite facts as to "the instance, advice and or inducement" nor has he condescended to providing any particular detail of the system of fraud he alleged the said Teh Hong Chiang perpetuated upon him. Except for vague dates for example "in or about the year 1966 and subsequent thereto" contained in paragraph 1 of the defendant's particulars, no other significant detail of dates was provided.

Having considered the law and the facts of this case, it is my opinion that the defendant has not been able to raise any sustainable argument against the plaintiff's application.

I therefore allow the application in terms of the summons-in-chambers dated 16th March, 1970 with costs.

Application allowed.

Solicitors: *Shook Lin & Bok; Athi Nahappan & Co.*

LEE KEE v. GUI SEE & ANOR.

[O.C.J. (Yong J.) October 20, 1971]

[Kuala Lumpur — Civil Suit No. 828 of 1969]

Negligence — Fire — Damage to adjoining property — Liability of owner.

The plaintiff sued the defendants for damages arising out of a fire which spread from the defendant's land to the adjoining land belonging to the plaintiff, and destroyed therein a large number of young rubber trees.

The defendants engaged one *T.K.L.* to clear unwanted trunks of rubber trees that were cut down, including dried leaves branches and weeds, that were on the land. He set fire to them without taking any precautions whatsoever. It was established that at the time when the fires spread to the plaintiff's land, neither *T.K.L.* nor any of the defendants or their servants were present on their estate.